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No. 82-869

In the Supreme Court of the United States

OCTOBER TERM, 1982

PHILIP ALAN FROUDE, et al.,
PETITIONERS,

v.

EAGLE-PICHER INDUSTRIES, INC., et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF EAGLE-PICHER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

1. Whether this diversity case presents an issue sufficiently important to commend review by this Court in view of the facts that (a) no federal question is presented and the interpretation of the contracts at issue is governed by principles of state law, that (b) the First Circuit purported solely to determine the subjective intent of the contracting parties, thereby limiting its decision to the parties to this lawsuit, and that (c) this Court has previously denied three petitions for certiorari in similar cases.

2. Whether a true conflict among the circuits exists which should be resolved by this Court.

3. Assuming the Court finds that this diversity case presents an issue sufficiently important to commend review by this Court, whether the Court should review that issue in this case in light of the facts that (a) Congress is presently considering legislation to resolve on a nationwide scale the issue presented by this suit, and (b) the interpretation issue between the parties to this lawsuit changed since this case was decided in the district court and is likely to undergo further constructive development in subsequent cases.

4. Whether the Court should review the rejection of pro-rata exposure as a theory of coverage under the insurance policies or review the discretionary denial of a motion to transfer pursuant to 28 U.S.C. § 1404(a).

List of Parties

Eagle-Picher Industries, Inc.* accepts as accurate petitioners' list of parties.

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* In compliance with Rule 28.1, Eagle-Picher states that it has no parent company and that its only non-wholly owned subsidiary is Diehl & Eagle-Picher GmbH.

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BRIEF OF EAGLE-PICHER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Eagle-Picher Industries, Inc. ("Eagle-Picher") submits this brief in opposition to the Petition for a Writ of Certiorari filed by Philip Alan Froude, Turegum Insurance Company, Ltd., and Excess Insurance Company ("Froude petition"). Eagle-Picher is also filing, under separate cover, a Conditional Cross-Petition For A Writ of Certiorari ("Eagle-Picher conditional cross-petition"), sought only if the Court grants the Froude petition.

Statement of the Case

Eagle-Picher is a diversified industrial manufacturer. For approximately forty years ending in 1971, one of its divisions manufactured insulation products containing asbestos. Eagle-Picher has been named as a defendant in a staggering number of lawsuits alleging personal injury resulting from exposure to asbestos-containing products ("underlying claims"). Beginning as a trickle of cases in the late 1960's, underlying claims filed against Eagle-Picher now total more than 16,000, with the number increasing at a rate approaching 500 per month.[1]

During the period January 1, 1968 to January 1, 1979, Eagle-Picher purchased, and was insured for underlying claims under, several comprehensive general liability insurance policies issued by petitioners and other insurers. Policies were sold to Eagle-Picher by several different insurers at both primary and excess insurance levels. Although the language of the policies at issue varies in some respects, all provide coverage to Eagle-Picher if the underlying claimant suffered bodily or personal injury during the policy period.

In October 1978, faced with conflicting positions asserted by its insurers regarding the extent of its coverage under its policies, Eagle-Picher filed the instant declaratory judgment action in federal district court based upon diversity of citizenship jurisdiction under 28 U.S.C. § 1332. The complaint sought a

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[1] The approximate number of asbestos related cases filed annually against Eagle-Picher is listed below.

1966	1	1972	2	1978	920
1967	0	1973	2	1979	2365
1968	0	1974	16	1980	3217
1969	3	1975	41	1981	5116
1970	2	1976	102	1982 (through October 1982)	4242
1971	3	1977	364		

declaration of the rights and obligations of the parties to certain policies of insurance purchased by Eagle-Picher.[2]

Prior to the commencement of this action, the insurance companies providing liability coverage to Eagle-Picher had split into two camps, each of which advocated a different, but limited, interpretation of their policies' application to underlying claims. Some insurers, namely the Froude petitioners and respondent American Motorists, contended that coverage is triggered at the time the claimant is exposed to the asbestos-containing product. Under this interpretation, generally referred to as the exposure theory, the insured is covered on a pro-rata basis for liability arising from underlying claims in which the claimant was *exposed* to the insured's asbestos-containing product during the policy period. The other insurers, namely respondent Liberty Mutual and the Bird respondents, argued for the manifestation theory, under which coverage is triggered at the time the injury first manifests itself, generally many years after the initial exposure. Under this theory, the insured is covered only for

[2] Eagle-Picher's insurance at issue in this lawsuit are (a) its primary level insurance for the period January 1, 1968 through January 1, 1979, provided by Liberty Mutual Insurance Company ("Liberty Mutual"), (b) its first layer excess insurance for the period June 1, 1973 through October 10, 1975, provided by American Motorists Insurance Company ("American Motorists"), (c) its first layer excess insurance for the period October 10, 1975 through January 1, 1979, provided by the London Market, and (d) its second layer excess coverage for the period September 19, 1973 to January 1, 1979, provided by the London Market.

The London Market refers to the insurance companies and underwriters at Lloyd's, London which subscribed to the first layer excess policy covering October 10, 1975 through January 1, 1979 and the second layer excess policies covering September 1, 1973 to January 1, 1979. One portion of the London Market, including Philip Alan Froude — a representative of certain Lloyd's underwriters, Turegum Insurance Company, Ltd. and Excess Insurance Company, espoused the exposure theory of coverage. The remaining portion of the London Market, referred to collectively as the Bird respondents, espoused the manifestation theory of coverage.

Eagle-Picher's coverage is graphically shown in Appendix A to the district court opinion. Petitioner's Opinion Appendix (hereinafter "Pet. App."), B18.

liability arising from underlying claims in which the claimant *manifested* the asbestos related injury during the policy period.

Throughout this case, Eagle-Picher has maintained that it purchased the broadest coverage available from the insurance industry—coverage intended to provide certainty to Eagle-Picher. Faced in the district court with the choice between the two narrow interpretations framed by the insurers, Eagle-Picher advocated the manifestation theory—the interpretation which, when compared to the exposure theory, seemed at that time better to fulfill the insurance promise.

After a short non-jury trial, the district court, on August 14, 1981, filed an opinion and judgment adopting the manifestation theory. Prior to the appeal of this case to the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the District of Columbia Circuit, in an asbestos insurance case, announced a third and comprehensive interpretation of typical liability insurance policies containing language substantially similar to that here at issue. *Keene Corp.* v. *Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, U.S. , 102 S. Ct. 1644 (1982). The D.C. Circuit, rejecting the coverage theories advocated by both insurers and insured, *id.* at 1047 n.25, instead adopted a theory of comprehensive coverage under which coverage is triggered by initial exposure, development of the disease, and manifestation of the disease or injury. Under comprehensive coverage, each insurer "on the risk" between the initial exposure to asbestos and the manifestation of a resultant disease is severely liable to its insured, without proration for liability and defense costs, up to the liability limits of the policy.

Subsequent to the D.C. Circuit's decision, Eagle-Picher filed a cross-appeal in the First Circuit and moved in that court for an order remanding the case to the district court for reconsideration in light of *Keene* and to enable the district

court to receive evidence relevant to comprehensive coverage which had been ruled irrelevant in the manifestation versus exposure trial. The First Circuit denied the motion.

On June 30, 1982, the First Circuit affirmed the district court decision, with a modification of the meaning of manifestation to "the date when the asbestos-related disease became reasonably capable of medical diagnosis." Pet. App., A4. Additionally, the court affirmed the district court's discretionary denial of Froude's motion to transfer the case. *Id.*, A8 n.1.

Summary of Argument

First, this case does not involve any federal question. The dispute between Eagle-Picher and its insurers is governed by state law, as is each other dispute between an asbestos manufacturer and its insurers. Since the highest court of each state, and not this Court, is the ultimate arbiter of state law, interpretation of these contracts by this Court would have no binding effect either on similar state court lawsuits or on similar federal court diversity lawsuits. Further, the opinions below are based upon positions specific to this lawsuit and will not determine the outcome of similar suits. This Court denied review in three prior petitions for writs of certiorari presenting this issue where the petitioners, like Froude, were unable to present a federal question. The limited importance of lawsuits concerning the rights and obligations of private contracting parties simply does not warrant review by this Court.

Second, no true conflict among the circuits exists. The purported split among the circuits is in reality an explicable and understandable difference in result based upon facts peculiar to the respective actions and parties.

Third, even assuming that this lawsuit presents a question commending review, this particular case is an inappropriate vehicle by which to resolve that question. Action by this Court at the present time may be premature since Congress is now

considering legislative solutions to the problem presented. Also, the *Keene* decision permits uniformity of interpretation consistent with the public policy rationales of the prior decisions on this issue. That uniformity will be fully explored in other pending lawsuits and will focus the issue in a manner helpful to the Court should the question later be presented.

Fourth, the pro-rata exposure theory espoused by the Froude petitioners was correctly rejected by both the district court and the First Circuit. The pro-rata exposure theory is inconsistent with the insurance policy language and the intentions of the parties. Finally, the denial of Froude's motion for a transfer of forum falls well within the district court's wide discretion and should not be reviewed by this Court.

Argument

I. This Case Does Not Present A Federal Question.

The ultimate issue in this case and the focus of the Froude petition is the interpretation of certain insurance policies. That issue does not raise or involve any constitutional or federal statutory claim. Rather, the petitioners assert that the Court should review this case because it "poses a significant *public question*." Froude petition, at 7. (emphasis added) The petitioners do not even attempt to characterize the question presented as a *federal question*.

A. *Interpretation of These Insurance Policies is Governed by State Law and, Consequently, is Ultimately Controlled by the Highest Courts of Each State.*

Eagle-Picher does not dispute the gravity of issues raised by the recent explosion in number of asbestos related product liability cases or the seriousness of the public health and policy questions concerning asbestos related disease. Nor does it dis-

pute that many actions are pending involving the interpretation of comprehensive general liability insurance policies as applied to asbestos related disease claims. However, because each of those insurance disputes concerns legal issues governed by state law,[3] review of this case by this Court will have no binding effect upon those other cases.[4]

In a diversity case, the lower federal courts and this Court are bound to follow applicable state law. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Federal diversity courts do not create substantive state law but simply apply existing state law or, if applicable state law is undecided, predict how the state's highest court would resolve the matter. Because "federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties," *Peterson* v. *U-Haul Co.*, 409 F.2d 1174, 1177 (8th Cir. 1969), this Court's interpretation or application of state law will not prevent subsequent (and possibly different) resolution of this issue by state courts. *See, e.g., Brady* v. *Maryland*, 373 U.S. 83, 90 (1963); *Gourley* v. *Chicago & E.I. Ry. Co.*, 295 Ill. App. 160, 173, 14 N.E.2d 842, 847 (1938). As such, Supreme Court review of the issues presented in this case could never fulfill the essential function of its discretionary jurisdiction: "to secure national rights and uniformity of judgments." E.T. Roehner & S.M. Roehner, *Certiorari - What is a Conflict Between the Circuits?*, 20 U. Chi. L. Rev. 656, 656 (1953). *Accord*, F. Frankfurter & H. Hart, *The Business of the Supreme Court at*

[3] Congress has declared that the business of insurance is a state function. McCarron-Ferguson Act, 15 U.S.C. §§ 1011-15 (1976). The "business of insurance" includes the interpretation of insurance contracts. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969).

[4] Of course, insurance coverage is just one aspect of the entire asbestos litigation problem and further review of this case, regardless of the outcome, will not eliminate the burden that the underlying claims have placed on the nation's courts. *Insurance Co. of N. Am.* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1226 n.29 (6th Cir. 1980), aff'd on rehearing, 657 F.2d 814 (6th Cir.), cert. denied, 454 U.S. 1109 (1981).

October Term, 1933, 48 HARV. L. REV. 238, 260 (1934).[5] Therefore, the petition for writ of certiorari should be denied.

B. *The Issue Presented is Merely One of Contract Interpretation Which Has No Binding Effect On Other Than the Contracting Parties.*

In addition to the non-federal nature of the issue presented, its national importance is further limited because the First Circuit decision depended upon the particular factual circumstances of the parties. The First Circuit's opinion itself makes clear that its analysis is confined to the subjective intentions of the contracting parties, and to the particular facts before it.[6] Pet. App., A10. Thus, the precedential value of the First Circuit opinion for disputes between different insurers and insureds will be limited, as those cases inevitably will involve different facts.

Further evidence of the limited nature of the First Circuit's ruling is the court's express limitation of its decision to the par-

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[5] Commenting upon the availability of the writ of certiorari to resolve conflicts among the circuits, then-Professors Frankfurter and Hart observed: "the Court is interested in conflicts which impair uniformity of decision, where uniformity is significant—*conflicts which its decision in the particular case will remove.*" (emphasis supplied). 48 HARV. L. REV. at 268. As discussed above, this is not the case here.

[6] The First Circuit stated: "[i]n construing the policies at issue, our dominant purpose is to give effect to the intentions of the parties." Pet. App., A10. In determining these intentions, the First Circuit, like the district court, *id.*, B16-17, considered the factual context in which Eagle-Picher had purchased its coverage. Eagle-Picher manufactured asbestos-containing products for forty years until 1971 and began purchasing products liability insurance in 1968. From 1971 until 1979 (when insurance for underlying claims became practically unavailable), Eagle-Picher greatly increased the amount of its coverage, even though the likelihood of exposure to its products diminished during that post-manufacturing period. Both lower courts inferred from this fact that Eagle-Picher had not intended to purchase "exposure theory policies."

The First Circuit distinguished the Sixth Circuit's decision in *Forty-Eight, supra* note 2 on the basis of "factual differences", including the fact that, in *Forty-Eight*, the insured carried insurance during a substantial period of exposure to its products. Pet. App., A21 and n.9.

ties and policies before it. The petitioners herein moved that the district court decline declaratory relief on the ground that not all of Eagle-Picher's insurance was in issue in this action. The First Circuit affirmed the denial of that motion, writing: "[W]e note that our disposition of this case cannot be binding on non-parties.... Declaratory relief will resolve the present controversy, and leave potential conflicts with the other insurers for another time." Pet. App., A9 n.1.

C. *This Court Has Previously Denied Petitions for Writs of Certiorari Raising This Same Issue.*

As discussed in Point II, *infra*, three other circuits have decided cases involving the coverage provided by comprehensive general liability insurance policies as applied to asbestos related disease claims. In each case, this Court denied a petition for a writ of certiorari. *Insurance Co. of North America* v. *Keene Corp.*, U.S , 102 S. Ct. 1644 (1982), *denying cert. to* 667 F.2d 1034 (D.C. Cir. 1981); *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 454 U.S. 1109 (1981), *denying cert. to* 657 F.2d 814 (6th Cir. 1981) *and* 633 F.2d 1212 (6th Cir. 1980); *Aetna Casualty & Surety Co.* v. *Porter*, 454 U.S. 1109 (1981), *denying cert. to Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981).

It is noteworthy that the reasons for review relied upon by Froude existed at the time of the denial of the petition for certiorari in *Keene*.[7] Whatever "split" in the circuits may now

[7] Attempting to distinguish this case from the past denials of certiorari in *Keene*, *Porter*, and *Forty-Eight* on the issue presented, the Froude petitioners contend that each denial "has resulted in a further financial deterioration of many of the asbestos manufacturers." Froude petition, at 8. From that unsupported assertion, petitioners wish the Court to infer that a granting of their petition and an adoption of the exposure theory would save insureds from financial ruin. Nothing could be more untrue for Eagle-Picher. Judicial imposition of pro-rata exposure coverage, as petitioners request, would assure that Eagle-Picher does not receive adequate, contracted-for insurance coverage, would assure *increased* financial burdens and would decrease the likelihood of successful claimants obtaining full and fair compensation.

be claimed to exist already existed between the D.C. Circuit and the Fifth and Sixth Circuits at the time of the *Keene* petition. There was also a similar proliferation of declaratory judgment actions. The fact remains, however, that, as with the prior petitions, the issue presented is incapable of uniform, binding resolution by this Court.

II. There Is No True Conflict Among The Circuits.

Even if a true split among the circuits exists on this state law question of insurance coverage, the writ of certiorari should not issue. "As to questions controlled by state law, . . . conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). There is not, moreover, a true split among the circuits. The different results reached in the various circuits are reconcilable when considering the factual differences in the cases.

The first federal appeals court to interpret the coverage of asbestos related claims under a general liability policy was the Sixth Circuit in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981) (*"Forty-Eight"*). On the facts before it, the court adopted the exposure theory, finding that, as between manifestation and exposure, the latter maximized coverage for that particular insured, *See* n.6 *supra*. Further, it noted that the medical testimony "strongly support[ed] the exposure theory." 633 F.2d at 1218. A few months later, the Fifth Circuit, noting that "[i]nsurance policies are to be construed and interpreted the same as other contracts and written agreements," adopted the exposure theory for the reasons stated in *Forty-Eight*. *Porter* v. *American Optical Corp.*, 641

Because of differing factual circumstances among the manufacturers, the only coverage interpretation which will, on a nationwide basis, decrease further financial deterioration of asbestos manufacturers is comprehensive coverage.

F.2d 1128, 1145 (5th Cir.), *cert. denied, sub nom. Aetna Casualty & Surety Co.* v. *Porter*, 454 U.S. 1109 (1981). Subsequently, the D.C. Circuit, honoring the objectively reasonable expectations of the insured when it purchased its insurance coverage, adopted the comprehensive coverage theory. *Keene Corp.* v. *Insurance Co. of North America*, 667 F.2d at 1041-42 & n.12.[8]

The First Circuit, on the other hand, found that, as between manifestation and exposure, the former maximized coverage for Eagle-Picher. The district court in Eagle-Picher made different factual findings based upon the medical evidence before it and expressly rejected the medical findings in *Forty-Eight*. Pet. App., A16 n.9.

III. Even If This Case Concerned An Important Federal Question, Review is Inappropriate.

One important consideration affecting the Court's exercise of its discretionary jurisdiction is whether the question presented for review has undergone the requisite legal development. Note, *Securing Uniformity in National Law*, 87 Yale L.J. 1219, 1244 and nn. 161-62 (1978). The concern that the issue presented be, in this sense, "ripe" for review takes at least two forms: first, a reluctance to intrude where the underlying problem is susceptible to political resolution, cf. A. Bickel, The Least Dangerous Branch 155 (1962); and second, a tendency toward restraint where, in complex cases, "[i]t may be desirable to have different aspects of an issue further illumined by the lower courts." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., dissenting). *Accord, Colorado Springs Amusements, Ltd.* v. *Rizzo*, 428 U.S. 913, 918 (1976) (Brennan, J., dissenting). Measured

[8] As explained more fully in Eagle-Picher's conditional cross-petition, only the comprehensive coverage theory maximizes coverage for insureds generally.

against these considerations, the issue presented by the Froude petitioners is not sufficiently developed to warrant this Court's review.

A. *Pending Legisation May Preempt or Moot Judicial Resolution of This Issue.*

Currently pending congressional activity may resolve some or all of the problems upon which the Froude petitioners rely. For the past several months, the Senate Judiciary Committee's Subcommittee on Courts, the House Science and Technology Committee's Subcommittee on Investigations and Oversight and other congressional subcommittees have been conducting hearings concerning a nationwide solution to the widespread burdens imposed by asbestos litigation upon claimants, manufacturers, insurers and the judicial system. *See, e.g.*, Asbestos Litigation Reporter, December 24, 1982, at 5,969; *Id.*, November 12, 1982, at 5,766. Regardless of the solution finally adopted, congressional action, if taken, will likely affect disputes between insureds and insurers, and may either preempt judicial action in this area or render this case moot. *See, e.g.*, S. 1643, 97th Cong., 1st Sess. (1981). With legislation on the horizon, the Court should decline review of this case.

B. *The Insurance Issue Has Developed Since This Case Was Decided in the District Court and Will Continue To Develop.*

From the inception of this case, through discovery, and until shortly after the district court decision, the entire focus of this case was upon a judicial choice as between the insurers' coverage theories of manifestation and exposure. This focus may also be responsible in part for the prior coverage decisions which, in choosing between exposure and manifestation,

sought to maximize a particular insured's coverage. However, the *Keene* decision properly rejected the limited "theories" advanced by the insurers, and adopted comprehensive coverage as a correct interpretation of this standard insurance language.

Unfortunately for Eagle-Picher, the First Circuit (in denying an Eagle-Picher motion for a remand) precluded Eagle-Picher from presenting *Keene* to the district court and then inferred that Eagle-Picher did not subjectively intend to purchase "comprehensive" coverage because it did not argue for such coverage in the court below. Pet. App., A21. The coverage issue will continue to develop in future cases as insureds seek comprehensive coverage while insurers continue to seek either manifestation or exposure. Assuming the Court believes this issue concerning insurance for asbestos related disease should be reviewed, such review should be deferred to allow the coverage issue to be developed further in the lower federal and state courts.

IV. The Froude Petitioners' Claims Were Correctly Rejected By the Courts Below.

A final reason for denying the Froude petition is that each claim for which it seeks review was correctly rejected by the lower courts.

A. *The Exposure Theory Was Properly Rejected.*

Although Eagle-Picher maintains that the manifestation result was incorrect,[9] there can be little doubt that the First Circuit correctly rejected pro-rata exposure as the proper theory of coverage. The exposure theory ignores the reasonable expectations of Eagle-Picher, leaving it virtually without

[9] As argued in Eagle-Picher's conditional cross-petition, if the Court reviews this case on the merits, it should adopt the comprehensive theory of coverage as set forth in *Keene Corp.* v. *Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981).

coverage for asbestos related claims. Moreover, the exposure theory is inconsistent with the medical evidence that asbestos related disease is an indivisible injury which develops over many years; asbestos related disease is not, as the exposurists contend, a series of single discrete injuries. "Bodily injury" covered by the policies properly means any part of the indivisible injurious process that asbestos related disease entails.

B. *The Motion To Transfer Was Correctly Denied.*

On the eve of trial, the Froude petitioners filed a motion pursuant to 28 U.S.C. § 1404(a) to transfer this case from the District of Massachusetts to the Southern District of Ohio. The movants contended that there was no justiciable controversy between Eagle-Picher and Liberty Mutual, and thus, that Liberty Mutual was not a proper party. Then, although conceding that venue was proper in Massachusetts with or without Liberty Mutual, Froude argued for a transfer, claiming that Liberty Mutual presented the only substantial contact with the Massachusetts forum.

Finding that a justiciable controversy did exist and exercising its broad discretion over motions to transfer, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), the district court denied Froude's motion. The First Circuit affirmed the district court on the grounds that Liberty Mutual has its principal place of business in Boston *and* that the Froude petitioners had not demonstrated any prejudice as a result of the Massachusetts forum. Pet. App., A8 n.1.

Assuming, *arguendo*, that no justiciable controversy existed between Eagle-Picher and Liberty Mutual and that the latter should have been dismissed from the case,[10] the district court remained wholly within its discretion in refusing to transfer

[10] The record plainly demonstrates the existence of such a controversy and the correctness of the rulings below that Liberty Mutual should remain in the case. The petitioners' contention that a letter resolved all disputes between Eagle-Picher and Liberty Mutual is incorrect. The District Court did not ac-

this case. Moreover, the Froude petition fails to show any prejudice resulting from trial in the Massachusetts forum. Even in the light most favorable to petitioners, the district court's decision was wholly within the bounds of its discretion. This routine decision on venue clearly does not present an issue worthy of review by this Court.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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cept Froude's requested finding that the letter altered or modified the insurance contracts issued by Liberty Mutual. The petitioners have not even attempted to demonstrate that this factual finding is clearly erroneous. Second, a justiciable controversy existed by virtue of the claim by American Motorists (an excess insurer directly above the Liberty Mutual primary policies) and by Froude that Liberty Mutual was construing its policies incorrectly. Further, Liberty Mutual contended throughout that manifestation meant actual date of diagnosis, while Eagle-Picher contended that it meant reasonably capable of medical diagnosis.